

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

STATE OF WASHINGTON,

Plaintiff,

v.

UNITED STATES NATIONAL
ARCHIVES AND RECORDS
ADMINISTRATION,

Defendant.

CASE NO. 2:21-cv-00565-TL

ORDER ON PLAINTIFF’S MOTION FOR
SUMMARY JUDGMENT AND MOTION
FOR STATUS CONFERENCE

This matter comes before the Court on the State of Washington’s (“Plaintiff’s” or “Washington’s”) motion for summary judgment (Dkt. No. 8) and motion requesting a status conference (Dkt. No. 24). The Court has considered the pleadings filed in support of and in opposition to the motions and the file herein and finds that oral argument is unnecessary.

Washington seeks summary judgment against the United States National Archives and Records Administration (“Defendant” or “NARA” or “Agency”) for failing to meet its obligations under the Freedom of Information Act (“FOIA”). Specifically, Washington claims that NARA (1) failed to provide a required determination regarding its records request, (2) delayed

1 production of responsive records, and (3) has improperly asserted certain FOIA exemptions to
2 withhold or redact otherwise responsive information. As discussed below, the Court GRANTS IN
3 PART and DENIES IN PART Washington's motion for summary judgment. Consequently, the
4 Court DENIES Washington's request for a status conference as moot.

5 I. BACKGROUND

6 This is Washington's second round of FOIA litigation arising from requests for records
7 related to the Federal National Archives in Seattle.

8 A. FOIA Litigation: Round 1

9 In February 2020, after learning of a proposed plan to sell the Seattle National Archives
10 building, Washington requested records about the federal government's plans from four different
11 federal agencies involved in the planning, including Defendant. In August and September 2020,
12 Washington filed similar FOIA lawsuits against each agency alleging the agencies failed to
13 promptly respond. *See State of Washington v. Office of Management and Budget*, 2:20-cv-1231-
14 RSL (W.D. Wash. 2020); *State of Washington v. U.S. National Archives and Records*
15 *Administration*, 2:20-cv-1232-RSL (W.D. Wash. 2020); *State of Washington v. U.S. General*
16 *Services Administration*, 2:20-cv-1233-RSL (W.D. Wash. 2020); *State of Washington v. Public*
17 *Buildings Reform Board*, 2:20-cv-1364-RSL (W.D. Wash. 2020). In December 2020—4 months
18 after filing the lawsuit and 10 months after its original FOIA requests—Washington was granted
19 summary judgment in its case against the Public Buildings Reform Board. *See State of*
20 *Washington v. Public Buildings Reform Board*, 2:20-cv-1364-RSL at Dkt. No. 18. There, the
21 Court ordered the agency to produce all remaining responsive documents on an expedited
22 timeline. *Id.* All four cases subsequently resolved through cooperation of the parties without the
23 need for further judicial intervention by December 2021.

B. FOIA Litigation: Round 2

This case arises from a new set of FOIA requests for additional records related to the National Archives building that Washington made on February 25, 2021. Dkt. No. 8 at 6. On March 1, NARA acknowledged receipt of the request and provided a tracking number. Dkt. No. 14 at 3. Since Washington did not request expedited processing, NARA scheduled the request for standard processing. *Id.* While that process was underway, this lawsuit was filed in April 2021.¹ Dkt. No. 1. Like the Round 1 cases, Washington alleges the Agency has failed to meet its FOIA obligations in responding to the new February 2021 request.

After the lawsuit was initiated, counsel for the Agency began communicating with counsel for Washington regarding the Agency's progress. Washington acknowledges that it has had regular communication with the Agency regarding its progress. Dkt. No. 8 at 7. The Parties communicated about the Agency's technical issues, clarification and modification of Washington's requests, and negotiating a stipulated production schedule. *Id.* at 7, Dkt. No. 14 at 4-6. Despite these communications, by August 2021 (six months after making the new FOIA requests and four months after filing the lawsuit), Washington had only received a single production representing a fraction of the anticipated documents, many of which were withheld or redacted. Dkt. No. 8 at 7.

Washington moved for summary judgment, requesting injunctive relief in the form of an expedited production schedule and preliminary determinations on the appropriateness of certain exemptions invoked in the Agency's initial productions. Dkt. No. 8. The motion, originally noted for September 10, 2021, was voluntarily re-noted for October 1 by Washington (see Dkt.

¹ Plaintiff has also asserted similar claims against the other three agencies from the Round 1 litigation in separate lawsuits. *See State of Washington v. Office of Management and Budget*, No. 2:21-cv-00564-TL (filed Apr. 27, 2021); *State of Washington v. Public Buildings Reform Board*, No. 2:21-cv-00566-TL (filed Apr. 27, 2021); *State of Washington v. U.S. General Services Administration*, No. 2:21-cv-00794-TL (filed Jun. 11, 2021).

No. 11), and the briefing schedule was adjusted accordingly by stipulation of the parties. *See* Dkt. Nos. 12, 13.

In late November 2021, the Parties further stipulated to continuing the previously adopted dispositive motion briefing schedule and revisiting the need for additional dispositive motions after Washington’s then pending motion for summary judgment was resolved. Dkt. Nos. 20, 21. On February 16, 2022, Washington filed an opposed motion requesting a status conference with the Court. Dkt. Nos. 24, 27, 28.

II. SUMMARY JUDGMENT STANDARD

Most FOIA cases resolve on summary judgment. *Animal Legal Def. Fund v. U.S. Food & Drug Admin.*, 836 F.3d 987, 989 (9th Cir. 2016) (en banc) (per curiam). Summary judgment is appropriate where, viewing “the evidence in the light most favorable to the nonmoving party,” the court determines that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Id.* (citing Fed. R. Civ. P. 56(c)). Material facts are those which might affect the outcome of the suit under governing law. *Moujtahid v. United States Citizenship & Immigr. Servs.*, 2020 WL 4000980, at *3 (W.D. Wash. July 15, 2020) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). To survive summary judgment “the nonmoving party must make a ‘sufficient showing on an essential element of her case with respect to which she has the burden of proof.’” *Id.* (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)).

III. DISCUSSION

FOIA establishes a “judicially enforceable public right” of access to federal agency records. *Elec. Frontier Found. v. Off. of the Dir. of Nat. Intel.*, 639 F.3d 876, 882 (9th Cir. 2010), *abrogated on other grounds by Animal Legal Def. Fund*, 836 F.3d at 989. In doing so, it imposes certain requirements upon any federal agency presented with a valid records request, including a

1 duty to: (1) determine within 20 days—or 30 days in unusual circumstances—whether to comply
2 with the request (*see* 5 U.S.C. § 552(a)(6)(A), (B)); and (2) make all appropriately requested
3 records promptly available to the requestor (5 U.S.C. § 552(a)(3)(A)). An agency may withhold
4 or redact otherwise responsive records by invoking any of nine narrowly construed statutory
5 exceptions. 5 U.S.C. § 552(b). However, “FOIA’s strong presumption in favor of disclosure
6 means that an agency that invokes one of the statutory exemptions to justify the withholding of
7 any requested documents or portions of documents bears the burden of demonstrating that the
8 exemption properly applies to the documents.” *Elec. Frontier Found.*, 639 F.3d at 883 (internal
9 quotations and citations omitted).

10 Plaintiff seeks summary judgment on its FOIA claims by arguing that Defendant has
11 failed to meet its FOIA obligations in three ways: (1) it has failed to provide an initial
12 determination; (2) it has failed to promptly produce responsive records; and (3) it has invoked
13 exemptions to withhold and redact records without sufficient justification.

14 **A. FOIA’s Determination Requirement**

15 FOIA requires an agency to make its initial determination within 20 days of receiving a
16 request or within 30 days under unusual circumstances. 5 § 552(a)(6)(A)(i), (a)(6)(B)(i); *see also*
17 *Aguirre v. United States Nuclear Regul. Comm’n*, 11 F.4th 719, 725 (9th Cir. 2021); *Citizens for*
18 *Resp. & Ethics in Washington v. Fed. Election Comm’n (CREW)*, 711 F.3d 180, 182 (D.C.
19 Cir. 2013). The agency’s determination must include “the scope of the documents that the
20 agency will produce, as well as the scope of the documents that the agency plans to withhold
21 under any FOIA exemptions.” *CREW*, 711 F.3d at 186; *accord Aguirre*, 11 F.4th at 726 n.1
22 (citing to *CREW* as “delineating the requirements for a proper response”). Defendant appears to
23 concede that it missed its statutory deadline but argues that it eventually met its determination
24 obligations by informing Plaintiff of the results of its search efforts, the scope of exemptions

1 invoked in its initial productions, and its expectation that similar exemptions would be required
2 for future productions. Dkt. No. 14 at 10-12. Plaintiff argues that the information Defendant has
3 provided is not specific enough to communicate the scope of documents it will produce or
4 withhold, sufficient to meet its FOIA obligations. Dkt. No 18 at 2-3. Although undeniably
5 untimely, the Court finds that Defendant has nonetheless met its obligation to provide a
6 substantive determination.

7 An agency's substantive determination obligations are met once the requestor has "actual
8 notice" of the information required for a determination. *Jud. Watch, Inc. v. U.S. Dep't of Just.*,
9 410 F. Supp. 3d 216, 224 (D.D.C. 2019). The record indicates that the Parties worked
10 cooperatively, at least until Plaintiff decided to file this motion, to identify the universe of
11 documents that would be reviewed for responsiveness and exemption based on negotiated search
12 parameters and then to determine a production schedule based on the results of those searches.
13 Thus, Plaintiff was fully aware of the scope of records involved in its request. Further, having
14 produced a subset of those records upon which exemption determinations were made, Defendant
15 appears to have met its obligations as to the scope of potential exemptions contemplated in
16 *CREW. See Cmty. Ass'n for Restoration of the Env't, Inc. v. U.S. E.P.A.*, 36 F. Supp. 3d 1039,
17 1049 (E.D. Wash. 2014) (finding that it was sufficient for the agency to inform the requestor that
18 it would apply similar exemptions to future productions as were applied to a subset of documents
19 previously produced).

20 The "penalty" for an agency missing its determination deadline "is that the agency cannot
21 rely on the administrative exhaustion requirement to keep cases from getting into court." *CREW*,
22 711 F.3d at 189. NARA does not challenge Washington's lawsuit on administrative exhaustion
23 grounds, but instead argues that Washington cannot receive its requested relief on summary
24 judgment due to the Agency's untimely determination. Dkt. No. 14 at 10-12. On the contrary,

1 Washington argues that injunctive relief is appropriate where there is a demonstrated pattern or
2 practice of violations by the Agency or where the delay in providing a determination is
3 egregious. Dkt. No. 8 at 12; Dkt. No. 18 at 3.

4 1. Washington Fails to Raise an Actionable Pattern or Practice Claim

5 “[P]attern-or-practice claims are viable under FOIA” when adequately alleged. *Aguirre*,
6 11 F.4th at 728; *see also Hajro v. U.S. Citizenship & Immigr. Servs.*, 811 F.3d 1086, 1107 (9th
7 Cir. 2016) (noting that “FOIA's prescribed relief is injunctive or declaratory, [so] generally a
8 plaintiff alleging a pattern or practice claim under FOIA must also meet th[e] future harm
9 requirement” to establish standing). Washington argues that it has adequately alleged a pattern or
10 practice claim that warrants injunctive relief. Dkt. No. 8 at 12-14. The Agency responds that no
11 such claim was raised in Washington’s Complaint, nor were sufficient facts alleged in the
12 Complaint to establish standing for a pattern or practice claim. Dkt. No. 14 at 11 n.6.
13 Washington counters by arguing that “it did include allegations regarding NARA’s prior FOIA
14 violations related to the same subject matter” in its Complaint. Dkt. No. 18 at 3. The only
15 allegations regarding its prior FOIA requests included in Washington’s Complaint are an oblique
16 reference to this being the second round of FOIA requests related to the Seattle National
17 Archives, Dkt. No. 1 at ¶ 1, and a footnote referencing the then still pending litigation stemming
18 from the first round of requests. *Id.* at 1 n.1. Even if these references were sufficient to imply a
19 pattern or practice claim was being raised, as Washington appears to argue, they are not
20 sufficient to meet the future harm requirement needed to establish standing for such a claim. Nor
21 may Washington amend its Complaint through briefing on summary judgment.

22 2. NARA’s Delay Was Not Egregious

23 Washington argues that the amount of time between its initial request and the Agency’s
24 initial production demonstrates an egregious delay. Dkt. No. 8 at 12-13. Washington relies

1 primarily on *P.W. Arms, Inc. v. United States*, which found that a 20-month delay before the
2 agency in question even initiated a search was sufficiently egregious to warrant injunctive relief.
3 *P.W. Arms, Inc. v. United States*, 2017 WL 319250, at *2 (W.D. Wash. Jan. 23, 2017). Similarly,
4 Washington points to *Oregon Natural Desert Association v. Gutierrez*, where the requestor was
5 left in the dark for eight months without a response from the agency. *Oregon Nat. Desert Ass'n v.*
6 *Gutierrez*, 409 F. Supp. 2d 1237, 1248 (D. Or. 2006). Even though length of delay was a
7 consideration in these cases, it was not the sole determinative factor in deciding that the
8 agencies' actions constituted egregious delay. Unlike in *P.W. Arms* or *Gutierrez*, here the
9 Agency: (1) actively communicated with Washington about its efforts to identify the universe of
10 potentially responsive documents; (2) worked with Washington to ensure it was conducting the
11 appropriate searches; and (3) cooperated with Washington to negotiate a review and production
12 schedule. Dkt. No. 8 at 7; Dkt. No. 14 at 4-7. At no point was Washington left completely in the
13 dark as to whether the Agency would respond to its request. To the contrary, Washington was
14 kept informed of the Agency's progress along the way.

15 While there is no doubt that the Agency failed to meet the statutory deadline for
16 providing a complete determination, its actions do not rise to the level of egregious delay as to
17 warrant injunctive relief. The appropriate "penalty" for the Agency's delay is to relieve
18 Washington of FOIA's administrative exhaustion requirement, but that is not at issue here. This
19 approach preserves the "[statutory] scheme [that] provides an incentive for agencies to move
20 quickly but recognizes that agencies may not always be able to adhere to the timelines that
21 trigger the exhaustion requirement." *CREW*, 711 F.3d at 189.

22 Plaintiff is not entitled to its requested relief for Defendant's untimely determination as a
23 matter of law. The Court therefore DENIES summary judgement on these grounds.

1 **B. FOIA's Prompt Production Requirement**

2 Agencies are expected to make requested documents “promptly available” which
3 typically means “within days or a few weeks . . . not months or years.” *CREW*, 711 F.3d at 188;
4 *see also Kinnucan v. Nat'l Sec. Agency*, 2021 WL 6125809, at *9 (W.D. Wash. Dec. 28, 2021)
5 (same) (quoting *CREW*, 711 F.3d at 188). Here, more than six months elapsed before the Agency
6 was prepared to even begin producing documents and, even then, at a relatively constrained
7 pace. Dkt. No. 14 at 5-6. The Agency proposed rolling productions that would not be completed
8 until the end of March 2022—more than a year after receipt of the request. *Id.* at 7. That this kind
9 of months long delay could result in summary judgement should be no surprise to the Agency.
10 *See Public Buildings Reform Board*, 2:20-cv-01364-RSL at Dkt. No. 18 (granting summary
11 judgment to the Plaintiff for the Agency’s failure to promptly produce documents in a case
12 involving similar parties, represented by the same counsel, regarding similar requests, under
13 similar circumstances).

14 The Parties appear to agree that such a delay is excusable if the Agency can show that the
15 delay was due to exceptional circumstances and that the Agency was nonetheless acting with due
16 diligence to complete the request. *See* 5 U.S.C. § 552(a)(6)(C). NARA relies on the fact that it
17 has experienced an increase in the volume of requests it has received in the past two years to
18 demonstrate exceptional circumstances. Dkt. No. 14 at 15. Despite acknowledging the steady
19 increase in its backlog, NARA admits that it only hired an additional part-time staff person to
20 assist in reducing the backlog in July 2021—five months *after* receiving Washington’s request
21 and three months *after* this lawsuit was filed. Dkt. No. 16 at ¶ 9-10. FOIA provides that “the
22 term ‘exceptional circumstances’ does not include a delay that results from a predictable agency
23 workload of requests under this section, unless the agency demonstrates reasonable progress in
24 reducing its backlog of pending requests.” 5 U.S.C. § 552(a)(6)(C)(ii). NARA fails to meet its

1 burden of demonstrating “reasonable progress in reducing its backlog” and, therefore, cannot
2 establish the delay was due to exceptional circumstances. For this reason, the Court need not
3 decide whether NARA was acting with due diligence, as its delay cannot be excused without a
4 showing of exceptional circumstances.

5 The Agency’s equitable arguments are now essentially moot. NARA spends much of its
6 opposition arguing that regardless of whether the Court finds that it has violated its FOIA
7 obligations, the Court should exercise its equitable discretion to deny Washington’s request for
8 injunctive relief in the form of expedited production. Dkt. No. 14 at 16-18. Essentially, NARA
9 argues that the balance of equities tilts in its favor because of the hardships an expedited
10 production schedule would cause to its process, likely negatively effecting the processing of
11 other requests, and because it would likely increase the risk of inadvertent disclosure of exempt
12 records. *Id.* The Court notes that at the time NARA prepared its opposition briefing, the Agency
13 was projecting being able to complete all productions by March 30, 2022. *Id.* at 7. Thus,
14 whatever the balance of equities may have been at the time, NARA has now had ample time, by
15 its own estimation, and the records request should be nearly complete. Any argument against
16 Washington’s requested injunctive relief based on the balance of equities is no longer availing.

17 For these reasons, the Court GRANTS summary judgment for Washington due to NARA’s
18 failure to promptly produce requested records. As such, the Court ORDERS NARA to produce all
19 remaining non-exempt public records responsive to the state’s request **within 21 days** of the date
20 of this Order.

21 C. The Agency’s Redactions of Documents

22 An agency may withhold or redact records by invoking any of nine narrowly construed
23 statutory exceptions, 5 U.S.C. § 552(b), but the agency “bears the burden of demonstrating that
24 the exemption properly applies to the documents.” *Elec. Frontier Found.*, 639 F.3d at 883

(internal quotations and citations omitted). Washington challenges some of the exemptions that the Agency invoked in the limited production it had received at the time of filing its motion for summary judgment, arguing that the Agency's conclusory justifications are insufficient. Specifically, Washington argues that the Agency failed to produce a *Vaughn* index, or the equivalent, with its initial productions. Dkt. No. 8 at 18. NARA responds by noting that a *Vaughn* index is typically the product of litigation and is not a requirement under the statute. Dkt. No. 14 at 19-20. While the Court generally agrees with the Agency on this point, the Court is nonetheless concerned about Washington's allegations regarding the lack of information provided by the Agency to support its invocation of exemptions. That said, the Court recognizes that the Agency had produced only a fraction of the documents involved in this litigation at the time Washington filed its motion and does not intend to make exemption determinations on a piecemeal basis, as that would be extremely inefficient.

Therefore, the Court DENIES as premature Washington's challenges to the Agency's exemption claims in its limited production set. However, the Court notes that "counsel for NARA did offer to prepare a *Vaughn* index as a potential way to try and resolve any disputed withholdings following the completion of NARA's FOIA productions." Dkt. No. 14 at 21. In line with the Court's order regarding expedited completion of all remaining productions and NARA's suggestion, the Court ORDERS NARA to provide Washington with a complete and comprehensive *Vaughn* index **within ten (10) days** of completing its production (or **within ten (10) days** of the date of this order, if the production has already been completed). The Parties are further ORDERED to meet and confer regarding the exemptions and to prepare a joint status report regarding the scope of any remaining exemption issues and a proposed briefing schedule regarding unresolved exemption challenges by **no later than April 25, 2022**. The Court

anticipates the Parties will be able to narrow the scope of remaining exemption challenges requiring Court intervention through this process.

D. Plaintiff's Request for a Status Conference

The Court DENIES the request for a status conference as moot per this Order. The Parties may request a status conference if warranted on alternate grounds.

IV. ORDER

Therefore, the Court GRANTS IN PART and DENIES IN PART Washington's motion for summary judgement (Dkt. No. 8) and DENIES Washington's request for a status conference (Dkt. No. 24). The Court further ORDERS that

1. NARA will produce to Washington all remaining non-exempt responsive records **within twenty-one (21) days** of the date of this Order;

2. NARA will produce to Washington a complete and comprehensive *Vaughn* index **within ten (10) days** of the completion of all remaining productions (or **within ten (10) days** of the date of this Order if all productions have already been completed);

3. The Parties shall meet and confer to narrow the scope of any remaining exemption challenges and shall prepare a joint status report and proposed dispositive motion briefing schedule to be filed **no later than April 25, 2022**.

The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing pro se at said party's last known address.

Dated this 18th day of March 2022.



Tana Lin
United States District Judge